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No. 94-1216

In the Supreme Court of the United States

OCTOBER TERM, 1994

J. CHARLES GILLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the notice of deficiency in petitioner's 1983 income taxes was sent to his "last known address" within the meaning of Section 6212(b)(1) of the Internal Revenue Code, 26 U.S.C. 6212(b)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 33 F.3d 46. The opinion of the district court (Pet. App. B1-B16) is reported at 838 F. Supp. 521.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1994. A petition for rehearing was denied on October 24, 1994 (Pet. App. E1). The petition for a writ of certiorari was filed on January 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a suit against the United States seeking damages under Section 7431 of the Internal

Revenue Code. That statute authorizes a suit for damages against the United States for the knowing or negligent disclosure of a taxpayer's "return or return information * * * in violation of any provision of [S]ection 6103 [of the Code.]" 26 U.S.C. 7431(a).[1] Petitioner contends that the Internal Revenue Service violated Section 6103 by disclosing his tax "return information" in connection with efforts made by the IRS to locate petitioner and to collect the income tax liability assessed against him for 1983.

1. Petitioner did not file an income tax return for 1983. A statutory notice of deficiency for his 1983 taxes was sent to petitioner on December 31, 1987, pursuant to Section 6212(a) of the Code. The notice was mailed to the Orem, Utah address that appeared on petitioner's return for 1982, the last year for which he had filed a return. Sometime after 1982, however, petitioner and his wife had moved from Utah to Oklahoma City, Oklahoma. Petitioner did not notify the IRS of his new address and filed no income tax returns during this period (Pet. App. A2, A3, B1, B2, B6).

Although petitioner had thus "dropped out" of the federal income tax system, his wife separately communicated with the IRS in May 1985, through an attorney, seeking to pay the joint income tax liability of petitioner and herself for 1982. The letter from her attorney informed the IRS that she did "not wish to involve her husband in her efforts to resolve this matter" (Pet. App.

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[1] 26 U.S.C. 7431(b) further specifies, however, that there shall be no liability in the case of "disclosure which results from a good faith, but erroneous, interpretation of [S]ection 6103." Under 26 U.S.C. 7431(c), a successful plaintiff may recover costs, actual damages, punitive damages in the case of willful or grossly negligent disclosures, and a minimum damage award of $1,000 for each act of unauthorized disclosure.

B2). For years after 1982, petitioner's wife filed "married but filing separately" income tax returns under her maiden name. Her separate returns reflected an Oklahoma address but did not mention petitioner by name, address or social security number (Pet. App. A3).

The notice of deficiency for petitioner's 1983 taxes, which was mailed to petitioner in 1987, was returned to the IRS undelivered. In 1988 and 1989, the IRS attempted to locate petitioner to collect his 1983 income tax liability and served various levies and filed notices of tax liens. In 1989, a revenue officer attempted to determine petitioner's current address by visiting the Orem, Utah, address listed on petitioner's 1982 tax return. The IRS also sent three postal tracers to the post office. Eventually, in April 1989, the IRS succeeded in discovering petitioner's then-current address in Broken Arrow, Oklahoma (Pet. App. A3).

2. In response to these tax collection efforts, petitioner filed this suit for damages under 26 U.S.C. 7431. Petitioner alleged that the IRS had wrongfully disclosed his tax return information under the following theory: (i) He contended that the notice of deficiency had not been sent to his last known address as required by Section 6212(b)(1) of the Code;[2] (ii) he asserted, as a

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[2] 26 U.S.C. 6212 provides in relevant part:

(a) In general.

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for Notice of Deficiency—

(1) Income and gift taxes and certain excise taxes

In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a

consequence, that the tax assessment made against him was invalid; (iii) assuming the assessment to be invalid, he contended that the IRS activities to collect that assessment were unauthorized; and (iv) assuming that the collection activities were unauthorized, he claimed that the disclosure of "return information" incident to those collection activities violated Section 6103 and therefore gave rise to a claim for damages under Section 7431 (Pet. App. A3, B5-B7).

Following a bench trial, the district court awarded petitioner $16,000 in damages under 26 U.S.C. 7431. The court concluded that the underlying assessment was invalid—and the subsequent collection efforts were therefore unauthorized—because the IRS had failed to send petitioner a notice of deficiency at his last known address. The court held that, notwithstanding petitioner's failure to provide the IRS with notice of his new address, the IRS had not exercised due diligence in ascertaining petitioner's correct address. The court stated that the IRS should have taken additional measures to find petitioner, such as by cross-referencing to the files showing the current location of petitioner's wife (Pet. App. A3-A4, B11-B12). For these reasons, the court held that the disclosures of tax information made by the IRS in the course of its efforts to locate petitioner and collect his outstanding taxes were unauthorized.

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deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * * *

The district court found 13 instances of unauthorized disclosure: two notices of federal tax lien filed against petitioner in Utah County, Utah, and Tulsa County, Oklahoma; eight notices of levy issued to banks and various other entities; two inquiries concerning petitioner's current address, made to the resident of the Orem, Utah address specified on petitioner's 1982 return and to the next-door neighbor; and a disclosure of petitioner's name and other return information to an individual at a former employer of petitioner. The court imposed minimum statutory damages of $1,000 for each of these instances of disclosure (Pet. App. B15-B16). In a subsequent order and judgment, the district court identified three additional unauthorized disclosures in the form of "postal tracers" that had been sent by the IRS to obtain petitioner's current address. The court awarded petitioner an additional $3,000 in damages for these disclosures (*id.* at C1-C3).

3. The court of appeals reversed (Pet. App. A1-A5). The court held that the challenged tax collection activities were not unauthorized because the IRS had mailed the notice of deficiency to petitioner at his last known address within the meaning of 26 U.S.C. 6212(b)(1). The court emphasized that, in issuing a notice of deficiency to a taxpayer's last known address, the IRS is entitled to rely on the address shown on the taxpayer's most recent return unless the taxpayer has provided the IRS with clear notice of a new address (Pet. App. A4-A5). Since it was undisputed that petitioner never notified the IRS that he had moved, the statutory notice of deficiency mailed to the address shown on petitioner's return for 1982—the last return he filed—complied with the statutory requirement that it be sent to his "last known address."

The court emphasized that, while the IRS must use "reasonable diligence in ascertaining a taxpayer's address," it is nevertheless entitled to rely on the return documents submitted by the taxpayer (Pet. App. A4). The court rejected the district court's conclusion that the IRS should have cross-referenced to file data concerning petitioner's wife, stating that her correspondence with the IRS was "not tantamount to notice from taxpayer that he had also moved" (*id.* at A4-A5). The court concluded that a taxpayer "who did not bother to file a tax return after 1982, will not now be heard to complain that the IRS was not adequately diligent in its efforts to track him down" (*ibid.*).

The court of appeals also concluded that the fact that the notice of deficiency sent to petitioner's Utah address had been returned to the IRS as undeliverable did not make that notice ineffective. The court pointed out that, under 26 U.S.C. 6212(b)(1), the notice of deficiency is valid irrespective of receipt if it is sent to a taxpayer's last known address (Pet. App. A4-A5). [3]

ARGUMENT

The court of appeals correctly held that, in the absence of any notice of a new address provided by petitioner to the IRS, the address shown by petitioner on the last tax

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[3] The court of appeals did not find it necessary to reach the additional arguments advanced by the government as independent grounds for reversing the decision of the district court. The court thus did not address whether Section 7431 provides a damage remedy for disclosures of tax information incident to collection activities undertaken in good faith but pursuant to a technically defective underlying assessment. See, *e.g.*, *Venen* v. *United States*, 38 F.3d 100, 104-107 (3d Cir. 1994); *Farr* v. *United States*, 990 F.2d 455, 457 (9th Cir.), cert. denied, 114 S. Ct. 554 (1993); note 1, *supra*.

return he had filed was his "last known address" for purposes of the statutory notice of deficiency. For that reason, as well as for the additional reasons not reached by the court of appeals (note 3, *supra*), the tax collection procedures undertaken by the IRS did not constitute "unauthorized disclosures" of return information.

1. Under Section 6213 of the Internal Revenue Code, a deficiency in federal income tax generally may not be assessed or collected until notice of the deficiency has been sent to the taxpayer. Under Section 6212, the Commissioner is authorized to give notice by mailing a "notice of deficiency" to the taxpayer's "last known address." 26 U.S.C. 6212(b)(1). Actual receipt of the notice is not required. Instead, Section 6212(b) explicitly provides that the notice "shall be sufficient" if mailed to the taxpayer at his last known address. See *Guillen* v. *Barnes*, 819 F.2d 975, 977 (10th Cir. 1987); *King* v. *Commissioner*, 857 F.2d 676, 681 (9th Cir. 1988). [4] While the IRS is to use "reasonable diligence" in ascertaining a taxpayer's address before mailing the notice, the agency is entitled to rely on the address shown on a taxpayer's most recent return as the taxpayer's last known address unless the taxpayer has provided clear and concise notice of a new address. See, *e.g.*, *Armstrong* v. *Commissioner*, 15 F.3d 970, 974 (10th Cir. 1994); *Pomeroy* v. *United States*, 864 F.2d 1191, 1195 (5th Cir. 1989); *King* v. *Commissioner*, 857 F.2d at 679-681; *United States* v. *Zolla*, 724 F.2d 808, 810 (9th Cir.), cert. denied, 469 U.S. 830 (1984).

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[4] Congress considered and rejected a proposal that would have required actual receipt of the notice. See Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297; 65 Cong. Rec. 2969-2670 (1924) (proposed amendment by Rep. Allen); J. Seidman, *Legislative History of Federal Income Tax Laws, 1938-1861*, at 759-761 (1938).

In this case, the IRS mailed the deficiency notice for 1983 to the address shown on petitioner's most recent return at that time, which was his 1982 return. As the court of appeals observed (Pet. App. A5), petitioner "did not bother to file a tax return" for subsequent years and moved three times—from Utah to Oklahoma City, then to a new residence in Oklahoma City, and ultimately to Broken Arrow—without providing notification of any of his changed addresses to the IRS. In these circumstances, the court of appeals correctly held that the notice of deficiency was properly sent to petitioner's last known address.

Petitioner suggests (Pet. 17-18) that, if the IRS had employed greater efforts, it might have been possible to track him down. But petitioner also does not dispute that he totally failed to advise the IRS of his new addresses. Under the settled authority on which petitioner himself relies (Pet. 15), when the taxpayer has not provided " 'clear and concise' notice of his current address to the IRS," the agency is entitled to rely on the address reflected on the taxpayer's most recent return. *Cyclone Drilling, Inc.* v. *Kelley*, 769 F.2d 662, 664 (10th Cir. 1985). The decision in this case is a direct application of that basic principle.

2. Petitioner asserts that the holding in this case improperly permits the IRS to "ignore clear evidence that a taxpayer has moved" (Pet. 19). That contention misses the point. The fact that the IRS is aware that a taxpayer has moved does not disable it from providing the notice required by the statute. By providing that valid notice may be sent to the *last known* address of the taxpayer, Congress plainly contemplated that notice may be sent to that location even when the *current* location of the taxpayer is no longer "known." Courts have thus correctly and consistently held that "notice mailed to

the last known address is sufficient even if it is never received." *King* v. *Commissioner*, 857 F.2d at 681.

Whether the evidence in this case reflects a sufficient degree of diligence in the Service's efforts to determine the address of the taxpayer before the notice was sent is, in any event, an inherently factual question. That factual question does not warrant further review.

3. There is general agreement among the courts of appeals that information acquired *after* the statutory notice is sent does not affect the validity of the notice, for the inquiry under the statute focusses "on the information available to the IRS *at the time it issued the notice of deficiency*." *Pomeroy* v. *United States*, 864 F. 2d at 1195, quoting *Mulder* v. *Commissioner*, 855 F.2d 208, 211 (5th Cir. 1988). See also *Williams* v. *Commissioner*, 935 F.2d 1066, 1067-1068 (9th Cir. 1991). "Nothing in the statute suggests that the IRS is obligated to take additional steps to effectuate delivery if the notice is returned; indeed, a notice mailed to the last known address is sufficient even if it is never received." *King* v. *Commissioner*, 857 F.2d at 681.

Petitioner is correct, however, in noting (Pet. 19) that the analysis applied by the Fourth Circuit in *Powell* v. *Commissioner*, 958 F.2d 53, cert. denied, 113 S. Ct. 440 (1992), is difficult to reconcile with the general view.[5] In

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[5] Petitioner errs in suggesting (Pet. 19-20) that other decisions reflect a conflict on this issue. For example, in *Berger* v. *Commissioner*, 404 F.2d 668 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969); *Armstrong* v. *Commissioner*, 15 F.3d 970 (10th Cir. 1994), and *Marks* v. *Commissioner*, 947 F.2d 983 (D.C. Cir. 1991), the courts of appeals upheld the validity of statutory notices because the taxpayers in those cases—like petitioner—had failed to provide clear and concise notice of a correct address to the Commissioner. In *Mulder* v. *Commissioner*, 855 F.2d at 212, the court concluded that, when letters to the taxpayer had been

Powell, the court held that the IRS has a duty of "diligence" to investigate and attempt redelivery when a notice of deficiency that is sent to the taxpayer's "last known address" is thereafter returned undelivered. 958 F.2d at 55-57. That aspect of the court's decision in *Powell* is contradicted (i) by the numerous decisions holding that the statutory inquiry focusses on the information available at the time the notice is mailed (*e.g.*, *Pomeroy* v. *United States*, 864 F.2d at 1195) and (ii) by the language of the statute, which provides that a notice that is "mailed" to the "last known address" is "sufficient" (26 U.S.C. 6212(b)(1)). [6]

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returned undelivered before the IRS issued the notice of deficiency to the same address, the agency should have contacted the tax return preparer—whose name and address were shown on the taxpayer's return (*id.* at 210)—to determine the taxpayer's current address. The *Mulder* court did not hold that information gained *after* the notice of deficiency is mailed is relevant in determining the sufficiency of the notice; indeed, the court stated to the contrary that the taxpayer's "last known address" under Section 6212 is to be determined from "the information available to the IRS at the time it issued the notice of deficiency." 855 F.2d at 211.

[6] *McPartlin* v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981), which petitioner cites (Pet. 20), does not conflict with the majority view. In that case, the court determined that the IRS had *not* sent the notice to the taxpayer's current address as reflected in the agency's own records. See 653 F.2d at 1187, 1190. In *McPartlin*, the IRS had specific knowledge of the taxpayer's change of address due to an ongoing criminal investigation. See *ibid.* The record in *McPartlin* thus established to the court's satisfaction that the notice of deficiency was not "mailed to the taxpayer at his last known address." The court went on in *McPartlin* to observe that, if the IRS was aware that the notice had not been delivered by the Postal Service, this would also be an indication that the notice was inadequate. As other courts have observed, however, that portion of the *McPartlin* opinion was dicta. *Keado* v. *United States*, 853

Nothing has occurred since this Court denied the government's petition for certiorari in *Powell* to make the conflict created by that decision a problem of greater magnitude. Other circuits have not been persuaded by *Powell* to reject the general rule. Moreover, the facts of this case provide little warrant for review of the *Powell* issue. Since petitioner failed to file tax returns and moved several times without providing any information concerning his change of address to the IRS, it is purely speculative whether a different judgment would result even if the different legal test enunciated in *Powell* were applied.

Moreover, as noted above, even if the notice of deficiency that was mailed to petitioner's last known address in Utah did not satisfy the "last known address" requirement of Section 6212(b)(1), there are substantial other reasons—which the court of appeals had no occasion to consider—to reject petitioner's claim for damages under Section 7431. See note 3, *supra*. Further review in this case is thus not warranted for the additional reason that a judgment of this Court on the question decided below would be unlikely to alter the ultimate disposition of this controversy.[7] Cf. *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

F.2d 1209, 1212 n.9 (5th Cir. 1988). In expressing that view, moreover, the *McPartlin* court did not consider or purport to reject its prior holding in *Rappaport* v. *United States*, 583 F.2d 298, 301 (7th Cir. 1978), that the statute "is satisfied by mailing notice to taxpayer's last known address whether or not actual notice is ever received" (*ibid.*, citing, *e.g.*, *Cohen* v. *United States*, 297 F.2d 760 (9th Cir.), cert. denied, 369 U.S. 865 (1962)).

[7] Petitioner also contends (Pet. 21-22) that he has been denied due process of law because he has no access to the Tax Court at this time for review of the notice of deficiency. That claim overlooks the fact that petitioner may still contest the lawfulness of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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claimed deficiency by paying the tax, filing an administrative claim and, if his claim is denied or not ruled on within 6 months, bringing a suit for refund. See 26 U.S.C. 6532(a), 7422(a); 28 U.S.C. 1346(a)(1); *Phillips* v. *Commissioner*, 283 U.S. 589 (1931).

Petitioner further argues (Pet. 22-25) that certiorari should be granted because the court of appeals reversed the district court's judgment instead of remanding the case for additional findings of fact and conclusions of law. Petitioner, however, did not urge such a remand in the court of appeals, either in his brief or, after the court's decision, in his petition for rehearing. Because this contention was not raised below, it does not afford a proper basis for further review. Moreover, the holding of the court of appeals—that the notice of deficiency was sent to petitioner's last known address—would foreclose similar challenges to the propriety of subsequent notices of intent to levy. Petitioner did not provide a notification to the IRS of his new address in advance of any of these statutory notices from the agency.